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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 519

MARVIN SHERWIN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 11, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals has not as yet been reported. This opinion is printed in Appendix B:

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 11, 1963. Rehearing was denied on August 8, 1963. The jurisdiction of this Court is invoked under 28 USC, Section 1254.

QUESTIONS PRESENTED

1. Is it proper in an income tax evasion prosecution to instruct that the specific intent to evade taxes may be inferred from the intentional omission of income?

2. In a criminal income tax case, is it proper to sustain a Government claim of privilege against a demand for the production of an Internal Revenue Service report relevant to the defense?

3. Is it proper to define wilfulness in an income tax prosecution as an act done without justifiable excuse or without grounds for believing it is lawful?

4. Under Rule 30 of the Federal Rules of Criminal Procedure, is a proper objection to an instruction waived if an instruction in the same language was originally submitted by the defense?

5. May an instruction on a theory of defense be denied where there is evidence to support the theory of defense?

6. May charges of income tax evasion under Section 7201 of Title 26, United States Code, be joined without merger with identical charges under Section

7206(1), charges of filing false returns in an income tax evasion prosecution?

STATUTES INVOLVED

The statutory provisions involved are Section 7201 of Title 26, United States Code and Section 7206(1) of Title 26, United States Code. They are printed in Appendix A.

STATEMENT

Petitioner, a Superior Court Judge of the State of California, was indicted on July 14, 1961 for attempted income tax evasion by filing a false and fraudulent income tax return in violation of Section 7201 of Title 26, United States Code, for the years 1954, 1955 and 1956, and wilfully making a false return in violation of Section 7206(1) of Title 26, United States Code, for the same exact years. (Tr. 27.)

In a bill of particulars the Government conceded that the specific items of omitted income were the same in the 7201 charges as they were in the 7206(1) charges. (Tr. 28.)

Motions were made to require the Government to elect between these groups of charges and denied. (Tr. 2647 and Tr. 4748).

The jury was instructed that no tax need be evaded for conviction under Section 7206(1) charges. Instructions were denied requiring the Government to prove

a tax evasion intent with respect to these charges. The Court instructed that intent could be inferred from the natural and probable consequences of acts knowingly omitted. (Tr. 1100.)

The Court defined wilfulness as an act done for a bad purpose without justifiable excuse and without ground for believing it is lawful. (Tr. 1108, 1109, 1115 and 1116.) Evidence was introduced that partnership income was wilfully omitted from petitioner's return. The jury was instructed that this evidence could be taken into account by them. However, the defense was denied an opportunity to examine an Internal Revenue agent's report and audit on this partnership and a Government claim of privilege sustained with respect to the same.

With respect to the instructions on wilfulness, the Court of Appeals refused to review, holding that the submission of one of the instructions by the defense waived the error despite the fact that the defense actually objected to the language of the instruction.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in direct conflict with *Morrisetti v. United States*, 342 US 246 and in probable conflict with *Bollenbach v. United States*, 323 US 607, in approving the following instruction:

> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the

evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused." (Tr. 1100.)

An income tax evasion charge requires a specific intent to evade income tax. The general language used indicates to the jury that they may infer intent to knowingly and wilfully evade taxes from the mere fact that income was omitted, since the natural and probable consequence of failing to declare income is that taxes will be evaded. It should be emphasized that this instruction applied also to the so-called false statement counts of the indictment. In these counts, the specific charge was falsely failing to declare income. The jury, from this instruction, was allowed to infer intent under the terms of the section from mere failure to declare income.

In the instant case, the majority of the omitted income was stipulated. The Court's instruction placed the defense in the position of stipulating to guilt. In *Morrisetti v. United States*, supra, this Court held that it was not proper to withdraw or prejudge the issue by instructions that the law raised a presumption of intent from an act where a specific intent is required. Here, where the distinction to a lay jury between evasion of income tax and mere improper exclusion of income is a nebulous one at best, the above instruction is manifestly improper as the Ninth Circuit so held in *Bloch v. United States*, infra. In-